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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

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In the Matter of	)	
Petition of MCI for Declaratory Ruling	)	
That New Entrants Need Not Obtain	)	CC Docket No. 96-98
Separate License or Right-To-Use	)	CCBPol 97-4
Agreements Before Purchasing	)	
Unbundled Elements	)	

REPLY OF GTE SERVICE CORPORATION TO MCI PETITION FOR DECLARATORY RULING

GTE Service Corporation ("GTE"), on behalf of its affiliated domestic telephone operating companies, hereby files this Reply to the Petition filed by MCI Telecommunications Corp. ("MCI") in the above-captioned matter.[1] The majority of parties commenting on MCI's Petition disagree with its assertion that intellectual property will be implicated only rarely by resold services and unbundled network elements ("UNEs") and oppose making incumbent local exchange carriers ("ILECs") responsible for obtaining any licenses that are required.[2] In particular, manufacturers noted that whether intellectual property of third party vendors is implicated will depend on a number of factors, including primarily how the competitive local exchange carrier

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[1] MCI Petition for Declaratory Ruling, CC Docket No. 96-98 (filed Mar. 11, 1997) ("MCI Petition").

[2] *See, e.g.*, Bellcore's Opposition to MCI's Petition for Declaratory Ruling, CC Docket No. 96-98 (filed Apr. 15, 1997)("Bellcore Comments"); BellSouth Comments, CC Docket No. 96-98 (filed Apr. 15, 1997)("BellSouth Comments"); Comments of Bell Atlantic and NYNEX, CC Docket No. 96-98 (filed Apr. 15, 1997)("Bell Atlantic Comments").

("CLEC") intends to use the intellectual property. Because no party has demonstrated that the Commission has authority under the Act to address MCI's Petition and because MCI's proposals will put unreasonable burdens on ILECs, GTE urges the Commission to deny the Petition.

I. No commenter has demonstrated that the Commission has authority to take the actions MCI requests.

In its Opposition, GTE explained that the Act does not give the Commission authority to review state decisions arising either from statements of generally available terms ("SGATs") or arbitrations, as MCI requests.[3] Section 252(e)(6) makes clear that any party aggrieved by a state decision in these proceedings should seek its remedy in the appropriate federal district court. This position is supported by the Public Utility Commission of Texas, the only state commission that filed in this proceeding.[4] The commenters supporting MCI's position neglect to mention this issue.

Those commenters supporting MCI also fail to show which "statute, regulation, or legal requirement" the Commission is being asked to preempt under Section 253. Once again, they simply ignore statutory requirements that preclude Commission action. In particular, until a specific statute, regulation, or legal requirement is brought to the

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[3] Opposition of GTE Service Corporation to MCI Petition for Declaratory Ruling, CC Docket No. 96-98 (filed Apr. 15, 1997)("GTE Opposition").

[4] Comments of the Public Utility Commission of Texas on the Petition of MCI, CC Docket No. 96-98, at 2 (filed Apr. 15, 1997) (stating that although the Commission has addressed the issue raised by MCI, "it is neither appropriate nor permissible for this Commission, in so doing, to make declarations as to the validity of any state commission's determinations under § 252 of the 1996 Act.").

Commission and a record on that statute, regulation, or legal requirement is developed, the Commission cannot issue a preemption order. Even Sprint, which supports putting the burden of negotiating CLEC licenses on ILECs, notes that the Commission may not have authority under Section 253 to preempt a requirement that the CLEC obtain any necessary licenses.[5]

II. Third party vendors confirm that determining when a CLEC needs a license is dependent upon the CLEC's specific plans.

The comments of equipment manufacturers all show that whether third party intellectual property is implicated by the resale of services or the sale of UNEs requires a case-by-case analysis.[6] In particular, it is not just the services or UNEs being sold that determine whether a CLEC license is needed, it is what the CLEC intends to do with the services or UNEs and what other services or UNEs the CLEC will combine with them. For example, Lucent states that, although no additional licenses will generally be required for resale or access to UNEs involving intellectual property, such licenses may be necessary if the CLEC uses the intellectual property to create its own applications or combines UNEs with elements of its own network or with elements obtained from third

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[5] Comments of Sprint, CC Docket No. 96-98, at 10 (filed Apr. 15, 1997).

[6] Comments of Northern Telecom Inc., CC Docket No. 96-98, at 5-8 (filed Apr. 15, 1997)("Northern Comments"); Comments of Lucent Technologies Inc., CC Docket No. 96-98, 2-6 (filed Apr. 15, 1997)("Lucent Comments"); Bellcore Comments at 1-3; Comments of Ad Hoc Coalition of Telecommunications Manufacturing Companies, CC Docket No. 96-98, at 1-3 (filed Apr. 15, 1997)("Ad Hoc Coalition Comments").

parties. Similarly, if the CLEC combines UNEs with resold services, a license may also be necessary.[7]

Northern Telecom, the Ad Hoc Coalition, and Bellcore all express similar concerns. Bellcore specifically states that, contrary to MCI's claims, "physical control" over the UNE does not determine whether third party rights are implicated:

> [i]f MCI, or other competitive carrier obtains access to the protected features, functions, interfaces and information contained in a software system ("Technical Information") and uses, discloses, displays, copies or transmits such "Technical Information" for its commercial benefit, that carrier is using the software system owner's IP.[8]

Northern Telecom also notes that vendor rights may arise not only with vertical features, but also from resold services or UNEs involving proprietary interfaces and/or protocols.[9] In addition, Northern Telecom explains that vendors may possess not only intellectual property rights, but also related confidentiality, restricted-use, and other rights.[10]

All of these parties oppose any provision of CLEC access which would violate vendor agreements. Northern Telecom urges that when intellectual property rights are implicated, the Commission should not require access without first permitting the vendor that owns the rights to determine on what terms it is willing to grant rights to the

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[7] Lucent Comments at 4-6.

[8] Bellcore Comments at 2-3.

[9] Northern Comments at 5-8.

[10] Northern Comments at 1-2.

requesting carrier and to ensure that such rights are protected through an agreement with the requesting carrier.[11] Bellcore asserts that direct negotiations between the vendor and the CLEC will be necessary in some cases, "such as where the third-party owner needs direct contractual privity with each user of its IP and the right to enforce its IP rights against each user itself."[12] Similarly, Lucent advises that "any Commission policies should not interfere with vendors' legal rights to protect their intellectual property and should preserve the vendors' rights to require additional licenses as may be necessary and appropriate to protect intellectual property from past, present or future misuse."[13] The only effective means of doing so is to require CLECs to deal directly with manufacturers when intellectual property rights are implicated.

III. Additional arguments raised by commenters in support of MCI's Petition have no merit.

Without exception, the arguments raised in support of MCI's Petition are not consistent with either the facts or the law. First, LCI argues that, if CLECs are required to negotiate their own agreements, ILECs should be forced to account for their licensing payments and not include those costs in charges to CLECs.[14] Such a policy would not allow ILECs to recover fully the costs of providing resold services or UNEs to CLECs. For example, in most cases, the ILEC must secure a license just to include the

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[11] Northern Comments at 6-7.

[12] Bellcore Comments at 3.

[13] Lucent Comments at 6.

[14] Comments of LCI International Telecom Corp., CC Docket No. 96-98, at 9 (filed Apr.

(Continued...)

intellectual property in its network. If the CLEC is to pay the full cost for use of a UNE that incorporates the intellectual property, it must pay a portion of the licensing costs that the ILEC paid. However, in this same case, the CLEC may also need an additional license to access the intellectual property or combine it with other UNEs. Thus, it must pay its fair share of the costs the ILEC incurred to combine the intellectual property with other parts of its network and the costs of using that intellectual property. In other cases, an ILEC may be required to pay the vendor on a per-use basis each time it accesses the intellectual property. In these cases, a CLEC would have a separate license and would probably also pay on a per-use basis, assuring that there is no "double payment."

In its comments, AT&T lists a number of UNEs that ILECs assertedly have made available in the past to other carriers without raising intellectual property concerns. AT&T goes on to claim that ILECs are only raising these claims now in order to avoid complying with their statutory obligations.[15] AT&T misunderstands the nature of the rights conveyed to ILECs in intellectual property licenses. These licenses frequently allow ILECs to use a vendor's intellectual property to provide services to end users, and services to an interexchange carrier as an end user. The examples AT&T cites are of this type.

(...Continued)
15, 1997).

[15] Comments of AT&T Corp. CC Docket No. 96-98, at 27 (filed Apr. 15, 1997).

Since only one of AT&T's examples references GTE's network, GTE cannot comment on whether the remaining arrangements have implications for vendors' intellectual property. However, GTE believes the BellSouth AIN offering that AT&T references only involved access through BellSouth's own platform, in which it held the relevant intellectual property rights. Because of intellectual property licensing issues, the only offers of access to ILEC service management systems and service creation environments have been through ILEC-owned platforms. As discussed in Section II above, in some cases CLEC use of vendor intellectual property through the purchase of resold services or UNEs will require a license, while in other cases such use will be covered by the existing license. Because these issues will depend upon the terms of the vendor license and the access the CLEC requires, AT&T's argument only provides further support for requiring CLECs to negotiate their own agreements with vendors.

For its part, the Competitive Telecommunications Association ("CompTel") claims that "[a]n ILEC cannot use any network facilities to provide telecommunications services unless and until requesting carriers are able to use such facilities through the purchase of network elements under Section 251(c)(3)."[16] This assertion is without legal basis and entirely irrational. CompTel purports to derive this conclusion from the Commission's requirement that ILECs provide CLECs with network elements on no less favorable terms than the ILEC provides to itself.[17] However, nowhere does the

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[16] Comments of the Competitive Telecommunications Association, CC Docket No. 96-98, at 3 (filed Apr. 15, 1997)("CompTel Comments").

[17] CompTel Comments at 2-3.

Commission state that ILECs must cease using parts of their networks until they are able to provide full unbundled access, and CompTel cites to no such provision. Congress certainly did not intend to shut down the nation's telecommunications network while CLECs are in the process of negotiating appropriate licenses with third party vendors.

IV. The comments confirm that ILECs should not be required to negotiate licenses with third party vendors on behalf of CLECs.

In its Opposition, GTE demonstrated that substantial problems likely will occur if ILECs are required to negotiate agreements on behalf of CLECs and that CLECs are as capable of negotiating such agreements as ILECs. Many commenters supported GTE's analysis. For example, Ameritech and SBC both note that it will be impossible for ILECs to negotiate on behalf of CLECs, since ILECs will not know how the CLEC intends to use the services or UNEs, what combinations the CLEC intends to devise, and what price the CLEC deems reasonable.[18] As Lucent and Northern Telecom stated, it is the use of the intellectual property that is critical to determining if a CLEC license is necessary, and that information is best known to the CLEC. Indeed, CLECs undoubtedly will be reluctant to share such information with ILECs, making it exceedingly difficult for ILECs to negotiate in any event. Likewise, any agreement an

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[18] Initial Comments of Ameritech, CC Docket No. 96-98, at 6 (filed Apr. 15, 1997); Comments of SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell, CC Docket No. 96-98, at 21-27 (filed Apr. 15, 1997)("SBC Comments").

ILEC did negotiate would probably trigger complaints by the CLEC regarding the price, conditions, or scope of the license.[19]

Many commenters also agree that CLECs are well able to negotiate such agreements.[20] Bell Atlantic and NYNEX and the Ad Hoc Coalition confirm that CLECs have as much (if not more) ability to bargain with vendors as ILECs.[21] In addition, BellSouth wonders how MCI is "able to keep a straight face" while asserting that MCI, AT&T, Sprint, and other multi-billion dollar companies are not in a position to negotiate favorable agreements.[22] The fact that the Ad Hoc Coalition believes that CLECs "may have greater bargaining power than ILECs to negotiate favorable use agreements for themselves"[23] is especially noteworthy, since its members are all manufacturers. As the manufacturers' filings have made clear, they are eager to negotiate with all parties to ensure that their intellectual property is sufficiently protected.

V. Conclusion

Intellectual property issues arising from the use of resold services and UNEs are complex, and the need for additional licenses must be determined on a case-by-case basis. Since only CLECs know how they intend to use the intellectual property, they

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[19] SBC Comments at 23.

[20] Likewise, SBC confirms that it is not an undue burden to have CLECs negotiate their own agreements, and in fact, this makes the most sense since only CLECs knows what their plans are for use of the intellectual property. SBC Comments at 23-25.

[21] Bell Atlantic Comments at 4; Ad Hoc Coalition Comments at 4.

[22] BellSouth Comments at 6.

[23] Ad Hoc Coalition Comments at 4.

are in the best position to negotiate any licenses they may need. Neither MCI nor any other commenter has given a persuasive reason why CLECs should evade this responsibility. Finally, and in any event, the Commission lacks authority to grant the relief MCI requests even if there were some policy basis for doing so, which there plainly is not. The Commission should expeditiously deny MCI's Petition.

Respectfully submitted,

GTE SERVICE CORPORATION,
on behalf of its affiliated domestic telephone operating companies

By: _____
Jeffrey S. Linder
Suzanne Yelen
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Its Attorneys

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 463-5214

May 6, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 1997, I caused copies of the foregoing REPLY OF GTE SERVICE CORPORATION TO MCI PETITION FOR DECLARATORY RULING to be served via first class mail, postage prepaid, on:

First Class Mail, postage prepaid:

Donna B. Verrilli, Jr.
Jodie L. Kelley
Jenner & Block
601 13th Street, N.W.
Washington, D.C. 20005

Lisa B. Smith
MCI Telecommunications Corp.
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Hand Delivery:

International Transcription Services (ITS)
1231 20th Street, N.W.
Washington, D.C. 20037

Janice Miles
Common Carrier Bureau
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

Daphne A. Johnson